Evidence Case Law Update[1]
(2020-22)

United States Supreme Court

1. *Goldman Sachs Group, Inc. v. Arkansas Teacher Retirement System*, 141 S. Ct. 1951 (2021)—Justice Barrett, writing for the majority, held that once plaintiffs in securities fraud class actions make a *prima facie* showing of fraud on the marketplace under *Basic, Inc. v. Levinson*, 485 U.S. 224 (1988), the burden of persuasion shifts to the defendants to prove price impact by a preponderance of the evidence. The Court explained that its precedent—both *Basic* and *Halliburton Co. v. Erica P. John Fund, Inc.*, 573 U.S. 258 (2014) ("*Halliburton II*")—placed this burden on defendants. Although Federal Rule of Evidence 301 would not shift the burden of persuasion, *Basic* and *Halliburton II* required that the "defendant must 'in fact' 'seve[r] the link' between a misrepresentation and the price paid by the plaintiff—and a defendant's mere production of *some* evidence relevant to price impact would rarely accomplish that feat." **[Fed. R. Evid. 301.]**

2. *Jones v. Mississippi*, 141 S. Ct. 1307 (2021)—Justice Kavanaugh, writing for the majority, held that a sentencer in a criminal case is not required to make a separate factual finding of permanent incorrigibility before imposing a discretionary sentence of life without parole on a juvenile homicide offender, abrogating lower-court decisions that held otherwise. The majority further held that a sentencer is not required to provide an on-the-record sentencing explanation with an implicit finding of the offender's permanent incorrigibility. Rather, it is enough—constitutionally necessary and constitutionally sufficient—under *Miller v. Alabama*, 132 S. Ct. 2455 (2012), that the sentencer has discretion to consider the mitigating qualities of youth and impose a lesser sentence. Justice Thomas concurred, while Justice Sotomayor, joined by Justices Breyer and Kagan, dissented. **[U.S. Const. Amend. VIII.]**

3. *Ramos v. Louisiana*, 140 S. Ct. 1390 (2020)—Justice Gorsuch writing for the Court held that the Sixth Amendment right to jury trial, as incorporated against the States by way of the Fourteenth Amendment, requires a unanimous verdict to convict a defendant of a serious offense. The majority opinion abrogated prior case law, as well as the practices in Louisiana and Oregon to convict and punish based on 10-2 verdicts (non-unanimous juries). **[U.S. Const. Amend. VI.]**

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4. *McKinney v. Arizona*, 140 S. Ct. 702 (2020)—A jury resentencing was not required after the Ninth Circuit Court of Appeals, on federal habeas corpus review, reversed a defendant's death sentences for failure to properly consider his PTSD as mitigating evidence. Instead, the 5-4 majority of the U.S. Supreme Court upheld the Arizona Supreme Court's procedure of itself reviewing the evidence in the record and reweighing the aggravating and mitigating circumstances, including defendant's PTSD. While, under *Ring v. Arizona*, 536 U.S. 584 (2002), juries are required to find aggravating circumstances that make a defendant *eligible* for the death penalty, a jury need not reweigh aggravating and mitigating circumstances in a harmless-error-review-type situation such as that here. The dissenting justices, for whom Justice Ginsburg wrote, would have found the Arizona Supreme Court to have engaged in a reopened direct, rather than just a collateral, review procedure, meaning that post-*Ring*, a jury would need to find the aggravators making McKinney death-eligible. **[U.S. Const. Amend. VI.]**

5. *United States v. Haymond*, 139 S. Ct. 2369 (2019)—In a 5-4 decision on the result, Justice Gorsuch wrote for the plurality, holding that a provision of federal law governing supervised release was unconstitutional where it allowed the factfinding supporting a new mandatory minimum sentence arising out of supervised-release revocation proceeding to be rendered by a judge by a preponderance of the evidence. As applied, the provision violated the Due Process Clause and the Sixth Amendment right to a jury trial. Justices Alito, Roberts, Thomas, and Kavanaugh dissented, writing that supervised-release revocation proceedings are akin to parole revocation proceedings and should be treated as such and not as part of the proceedings on the conviction in chief. **[U.S. Const. Amends. V, VI.]**

6. *Biestek v. Berryhill*, 139 S. Ct. 1148 (2019)—Justice Kagan delivered the opinion of the court in this administrative law case, noting that whatever the meaning of 'substantial' in other contexts, the threshold for evidentiary sufficiency when courts review administrative agency factfinding under the "substantial evidence" standard is not high. Thus, a government vocational expert's refusal to provide the private market-survey data underlying her opinion regarding job availability, upon the disability applicant's request, did not categorically preclude the expert's testimony from counting as "substantial evidence." Instead, it is a case-by-case inquiry, abrogating *McKinnie v. Barnhart*, 368 F.3d 907 (7th Cir. 2004), which had held that an administrative law judge erred in failing to take into account the reliability of a vocational expert's conclusions. Justices Sotomayor and Gorsuch filed dissents, and Justice Ginsburg joined in Justice Gorsuch's dissenting opinion; the dissents generally supported the case-by-case inquiry, but both dissents would have not found the "substantial evidence" standard met in this

particular case. **["Substantial evidence" standard and reliability of expert evidence.]**

7. *Pena-Rodriguez v. Colorado*, 137 S. Ct. 855 (2017)—The court reversed and remanded defendant's harassment and unlawful sexual contact convictions based on post-trial affidavits from two jurors that another juror had expressed anti-Hispanic bias toward defendant and his alibi witness. The court held that before the no-impeachment bar of Fed. R. Evid. 606(b) can be set aside to allow further judicial inquiry, there must be a threshold showing that one or more jurors made statements exhibiting overt racial bias that cast serious doubt on the fairness and impartiality of the jury's deliberations and resulting verdict. To qualify, the statement must tend to show that racial animus was a significant motivating factor in the juror's vote to convict. Whether the threshold showing has been satisfied is committed to the substantial discretion of the trial court in light of all the circumstances, including the content and timing of the alleged statements and the reliability of the proffered evidence. **[Rule 606(b) and Ariz. R. Crim. P. 24.1(d).]**

Federal Courts

1. *United States v. Litwin*, 972 F.3d 1155 (9th Cir. 2020)—There was a reasonable possibility that a juror was dismissed from the jury simply based on her views of the merits of the government's case, in violation of the Sixth Amendment. The district court was not itself permitted to submit additional declarations regarding the juror on appeal, given the serious due process concerns those would raise and given that this was not a situation in which Federal Rule of Appellate Procedure 10(e) allows a district court to correct or modify a record on appeal. The trial court has two options when faced with a juror who will not agree with others on the jury about the strength of the government's case: (1) declare a mistrial, or (2) send the juror back and instruct the jury as a whole to continue trying to reach agreement. **[U.S. Const. Amend. VI.]**

2. *United States v. Valencia-Lopez*, 971 F.3d 891 (9th Cir. 2020)—The federal trial court abused its discretion by qualifying an Immigration and Customs Enforcement (ICE) Supervisory Special Agent as an expert without explicitly finding reliability of that proffered expert's testimony. The agent testified that there was almost no likelihood drug cartels would coerce a truck driver at gunpoint to carry illegal drugs across the border, as defendant claimed in his defense. The court's dismissal of an objection as going to the weight of the evidence and not the admissibility was not a reliability determination, and the trial court denied the defendant's requests for voir dire of the proposed expert—even though the court had offered that in place of a *Daubert* hearing.

An implicit reliability finding is not sufficient to satisfy the trial court's gatekeeping function. **[Fed. R. Evid. 702.]**

3. *Grodzitsky v. Honda*, 957 F.3d 979 (9th Cir. 2020)—The majority of the panel found that expert testimony may be and was properly excluded as unreliable under the *Daubert* standard when testimony regarding motor vehicle window regulator-part stated standard as "shouldn't fail ever," when expert's methodology was flawed due to overly expansive theory, when application was flawed by small sample size of only 26 versus 400,000 overall in existence, and when—among other things—expert stated no scientific basis for the observations. **[Fed. R. Evid. 702.]**

4. *United States v. Aragon*, 796 Fed. App'x 409 (9th Cir. March 5, 2020) (mem.)—The district court did not abuse its discretion in admitting an arresting officer's identification of the defendant's voice on recorded telephone calls, as the officer had heard defendant speak after his arrest. Federal Rule of Evidence 901(b)(5) has a 'low threshold for voice identifications,' wherein it states: "An opinion identifying a person's voice—whether heard firsthand or through mechanical or electronic transmission or recording—based on hearing the voice at any time under circumstances that connect it with the alleged speaker," is sufficient to satisfy the requirement of authenticating evidence. **[Rule 901(b)(5).]**

5. *United States v. Phillips*, 929 F.3d 1120 (9th Cir. 2019) and 773 Fed. App'x 400 (July 11, 2019) (mem.)—In a matter of apparent first impression, the evidence-of-pecuniary-value requirement inherent in a federal murder-for-hire conviction was satisfied by evidence that the defendant promised to forgive a $30,000 loan made to the hitman in exchange for the murder, even though the loan was legally unenforceable as it was made for an illegal marijuana-grow venture. In a separate memorandum decision issued the same day, the panel of the Ninth Circuit Court of Appeals found that the district court abused its discretion when it granted a government motion *in limine* to preclude any evidence of the defendant's kidney disease as irrelevant and unduly prejudicial. The defendant had wanted to use evidence of his illness to explain why he was fatigued, confused, and non-confrontational when the hitman told him in graphic terms about the murder he had supposedly carried out at defendant's behest. The evidence should not have been precluded, as any danger of undue sympathy elicited could have been remedied by sanitizing it appropriately. The error was harmless, however, because the jury had a substantial amount of additional evidence on which to convict. The error also did not deprive defendant of the right to present a complete defense or testify in his own defense. **[Rule 403.]**

6. *United States v. Ruvalcaba-Garcia*, 923 F.3d 1183 (9th Cir. 2019) and 2019 WL 2083251 (mem.) (9th Cir. May 10, 2019)—In this illegal entry case, the defendant challenged the government expert's testimony that a fingerprint taken during the underlying removal proceedings belonged to him. The court found that the district court abused its discretion admitting the fingerprint analyst's testimony, by not performing the gatekeeping function required of judges under *Daubert v. Merrill Dow Pharm, Inc.*, 509 U.S. 579 (1993), and Fed. R. Evid. 702, but that the error was harmless because the record was sufficient to determine that the testimony had a reliable basis in the knowledge and experience of the relevant discipline, which has been tested in the adversarial system for roughly 100 years. In a separate memorandum decision issued the same date, the panel held, under Fed. R. Evid. 1005 and 1001(e), that the district court did not abuse its discretion by admitting enlarged and enhanced document copies from the defendant's "A-file." **[Rules 702, 1005, 1001(e).]**

7. *United States v. Lopez*, 913 F.3d 807 (9th Cir. 2019)—Vacating the defendant's convictions for false statement during the purchase of a firearm, aggravated identity theft, and felon in possession of a firearm, the court held the district court erred in precluding the defendant's proffered expert testimony on Battered Woman Syndrome to support her duress defense and rehabilitate her credibility. The court rejected the government's Rule 403 argument, noting "'that the exclusion of evidence offered by the defendant in a criminal prosecution under Rule 403 is 'an extraordinary remedy to be used sparingly.' *United States v. Haischer*, 780 F.3d 1277, 1281 (9th Cir. 2015) (quoting *United States v. Mende*, 43 F.3d 1298, 1302 (9th Cir. 1995))." *Id.* n. 8. **[Rule 403.]**

8. *Claiborne v. Blauser*, 934 F.3d 885 (9th Cir. 2019)—Visible shackling of convicted felon serving lengthy sentence when he appeared in federal court as civil litigant for three-day trial on his § 1983 claims was a violation of due process requiring a new trial, when there was no showing of a sufficient need for such restraints. In addition, in a footnote, the panel noted that the district court appeared to misstate the law on Rule 706(a) of the Federal Rules of Evidence, which provides discretion to appoint a neutral expert witness. The trial court seemed to categorically limit the relevance of a medical expert to testifying about a plaintiff's current condition. "Yet courts have regularly considered requests for and appointed experts to review medical records and testify about prior medical needs and treatment in deliberate indifference cases. . . . Moreover, a medical expert can help with factfinding in excessive force claims because 'the extent of injury suffered by an inmate is one factor that may suggest whether the [defendant's] use of force could plausibly have been thought necessary in a particular situation.' . . . If Claiborne renews his request for appointment of a neutral medical expert on retrial, the district

court should weigh these considerations in exercising her discretion." **[U.S. Const. Amend. V; Rule 706(a).]**

9. *United States v. Valle*, 940 F.3d 473 (9th Cir. 2019)—In a prosecution for illegal reentry after deportation, the government was required to prove—by clear and convincing evidence—the defendant's continuous presence in the United States to support sentencing enhancements, including direct evidence of where defendant was during the relevant time period. Because there was already a full inquiry into the factual question at issue, on remand, the government was not entitled to a second bite at the apple and could not submit any new evidence of the defendant's whereabouts for purposes of resentencing. **[Clear and convincing evidence standard; preclusion of additional evidence on remand.]**

10. *Khoja v. Orexigen Therapeutics*, 899 F.3d 988 (9th Cir. 2018)—District court erred in taking judicial notice of certain documents attached to pleadings at the motion-to-dismiss stage because the documents included disputed facts. "A court may take judicial notice of matters of public record without converting a motion to dismiss into a motion for summary judgment." *Lee v. City of Los Angeles*, 250 F.3d 668, 689 (quotation marks and citation omitted). But a court cannot take judicial notice of disputed facts contained in such public records. *Id*. **[Rule 201.]**

11. *In re Volkswagen "Clean Diesel" Marketing, Sales Practices, and Products Liability Litigation*, — F. Supp. 3d —, 2020 WL 6688912 (N.D. Cal. November 12, 2020)——The District Court for the Northern District of California excluded plaintiffs' expert opinion evidence as unreliable and dismissed case for lack of jurisdiction as plaintiffs had failed to show an injury in fact at the close of discovery and therefore lacked standing. The district court, in its gatekeeping role, excluded one plaintiffs' expert where several aspects of his methodology stood out as "flawed even to the untrained eye" and also excluded another where he did not tailor his analyses to the pertinent damages theories. **[Rules 402, 702.]**

Arizona Supreme Court

1. *State v. Porter*, 251 Ariz. 293 (2021)—The Arizona Supreme Court considered whether, when a *Batson* challenge is raised, a trial court must make express findings on the credibility of a demeanor-based justification for a peremptory strike. The Arizona Supreme Court reviewed the history of *Batson* and considered whether *Snyder v. Louisiana*, 552 U.S. 472 (2008), requires trial courts to make express findings on the credibility of a demeanor-based justification when responding to a *Batson* challenge. The Arizona Supreme Court concluded that *Snyder's* express-finding requirement is not applicable

when a lawyer offers a demeanor-based and a non-demeanor-based justification and neither is clearly pretextual. The Supreme Court further rejected a requirement that trial courts are always required to make explicit findings but encouraged trial courts to make them as they will bolster rulings and facilitate review on appeal. At trial, the prosecutor used two peremptory strikes to remove the only Black venire members. Defendant raised a *Batson* challenge as to both jurors. The trial court denied the challenge. The Court of Appeals found that the lack of any findings regarding a prospective juror's demeanor precluded it from determining whether a prosecutor's peremptory strike was a pretext for racial discrimination and required remand. The majority opinion counseled that a trial court confronted with a pattern of strikes against minority jurors must determine expressly that the racially disproportionate impact is justified by genuine—and not pretextual—race-neutral reasons. The dissent did not find clear error in the trial court's failure to find that the striking party was motivated in substantial part by discriminatory intent and found that the trial court had followed Arizona's current *Batson* jurisprudence as it stood. The dissenting judge also urged Arizona's court-rulemaking process as a better forum for the Arizona Supreme Court to review and change the overall approach to *Batson* issues. The Supreme Court found the trial court did not clearly err in denying the *Batson* challenge. The Arizona Supreme Court eliminated the use of peremptory strikes in civil and criminal trials as of January 1, 2022. **[*Batson v. Kentucky*, 476 U.S. 79 (1986); *Snyder v. Louisiana*, 552 U.S. 472 (2008); U.S. Const. Amend. XIV.; Ariz. Sup. Ct. Or. No. No. R-21-0020 (Aug. 30, 2021 (removing peremptory challenges from the Rules of Civil and Criminal Procedure).]**

2. *Crime Victims R.S. & S.E. v. Hon. Thompson ex rel. Maricopa Cty.*, CR-19-0395-PR (Ariz. April 29, 2021)—The Arizona Supreme Court resolved differing Arizona Court of Appeals opinions and held: "[W]hen a criminal defendant's due process right to present a complete defense conflicts with a victim's state constitutional or statutory rights governing privileged mental health records, the victim may be compelled to produce such documents for in-camera review if the defendant shows a reasonable possibility that the information sought includes evidence that would be material to the defense or necessary to cross-examine a witness." The Arizona Supreme Court rejected a more stringent "substantial probability" test that had been adopted by the Arizona Court of Appeals below. That test had required that there be (1) a substantial probability that the protected records contain information that is trustworthy and critical to an element of the charge or defense, or (2) a showing that their unavailability would result in a fundamentally unfair trial.

3. *State v. Murray*, 250 Ariz. 543 (2021) (consol.)——Justice Lopez writing for a unanimous Court held that a prosecutor's single misstatement of the beyond-

a-reasonable-doubt standard during a rebuttal argument constituted fundamental, prejudicial error, as it went to the foundation of the case and deprived defendants of an essential right. On the record before the Arizona Supreme Court, neither the trial court's jury instructions, nor the usual presumption that the jury follows the instructions, cured the prejudice. In rebuttal closing, the prosecutor delivered the following:

> So here is how to think when you might hear somebody say back there, well, I think one or both defendants might be guilty but I'm not sure it's beyond a reasonable doubt. Now, stop and ask yourself another question at that point. Why did I just say that? Why did I just say that I think the defendants might be guilty? You are a fair and impartial juror. If you are thinking that, if you are saying that, is it not proof that you have been persuaded by the evidence in the case beyond a reasonable doubt? Because why else would you say that were you not convinced by the State's evidence? So when you hear yourself say that, ask yourself the second question why, why do I think he is guilty? Because he is guilty because you have been convinced by the State's case beyond a reasonable doubt. That's why you think as you do being fair and impartial.

Defense counsel did not object, and the trial court did not comment on or correct that particular point of rebuttal. The jury convicted the defendants of aggravated assault, and the defendants were sentenced to five years' in prison. The Arizona Supreme Court found that the rebuttal was prosecutorial misconduct; the prosecutor's invitation for the jury to conclude that its belief that defendants "might be guilty" was a determination of guilt beyond a reasonable doubt impermissibly circumvented the due process requirement that a jury be firmly convinced of a defendant's guilt. The Court found that defendants were prejudiced, reversed their convictions, sentences, and the Court of Appeals' affirmances of them, and remanded the cases for new trials. **[(Rule 611(a)); Ariz. Const. amends V, VI.]**

4. *State v. Gomez*, 250 Ariz. 518 (2021) ——Justice Bolick writing for a unanimous Court held that DNA evidence that was scientifically insufficient to establish identity was still properly admitted to demonstrate that a man other than the victim's husband had touched her genitals. An Uber passenger was convicted for sexual assault of his driver after the trial court overruled arguments that the DNA profile evidence was inadmissible under Ariz. R. Evid. 401 and 702 and admitted the evidence while precluding the State from arguing that the evidence established that Defendant's DNA was present. The Arizona Supreme Court found that given "the careful presentation of the testimony, the opportunity for cross-examination, and the State's characterization of the testimony during closing argument, the evidence was

neither unfairly prejudicial to Gomez nor confusing to the jury." It vacated a Court of Appeals memorandum decision that held otherwise and remanded to the Court of Appeals for it to resolve the issue of whether a detective's response to a question at trial constituted fundamental error. **[Ariz. R. Evid. 401, 403, 702.]**

5. *France v. Industrial Comm'n*, 2021 WL 800755, --- Ariz. --- (March 2, 2021) ——Courts apply an objective, reasonable person standard in determining whether the evidence shows the stress placed on an employee by a work-related incident is "unexpected, unusual or extraordinary," to be compensable under the Workers' Compensation Act as it is applied to mental injuries. The court's focus should be on the stress imposed on the worker, rather than how the worker himself or herself experienced it. **[Standard under A.R.S. § 23-1043.01(B).]**

6. *State v. Mixton*, 250 Ariz. 282 (2021)——Defendant had no reasonable expectation of privacy in his internet protocol address and subscriber information he voluntarily provided to an internet service provider, under private affairs clause of State Constitution, which the majority found should be interpreted, in this situation still, as having the same general purpose and effect as the Fourth Amendment. A dissent by Justice Bolick, joined by Justices Brutinel and Timmer, disagreed that the private affairs clause of the State Constitution should be interpreted so in lockstep with the Fourth Amendment. The dissent's analysis of the private affairs clause revealed it "was clearly intended to provide additional and forceful protections to Arizonans against government intrusions into their private affairs." **[U.S. Const. Amend. IV; Ariz. Const. art. 2, § 8.]**

7. *State v. Smith*, 250 Ariz. 69 (2020)——The good faith exception to exclusionary rule applied to a defendant's Cell Site Location Information (CSLI) that a detective obtained through order issued through Initial Appearance Court, as the detective reasonably relied on then-existing law. Two years after the reliance, in June 2018, the Supreme Court decided *Carpenter v. United States. See* —— U.S. ——, 138 S. Ct. 2206 (2018). Additionally, while it would have been better practice for the trial court to view a CSLI-related video in its entirety before admitting it, the court had seen substantially the same information in a PowerPoint, and any alleged inaccuracies were appropriately clarified through a detective's testimony about its limitations. **[U.S. Const. Amend. IV.]**

8. *State v. Hernandez*, 250 Ariz. 28 (2020)——As a matter of first impression, evidence is "obviously material," in context of whether a *Willits* instruction is needed, when the State relies on the evidence or knows the defendant will use the evidence for his defense—*at the time the State encounters the evidence during its investigation*. Trial court did not abuse its discretion in

concluding—based on facts known to State at the time of its investigation—that it was reasonable for the State not to collect fingerprint and DNA evidence from interior of a vehicle.

9. *Clements v. Hon. Bernini ex rel. Pima Cty.*, 249 Ariz. 434 (2020)—A trial court may not invade the attorney-client privilege—even *in camera* via use of a special master—to determine its existence, and inmate—through counsel—had to be allowed to review recorded jail phone calls to determine whether he could validly assert the privilege regarding them. **[Ariz. R. Evid. 501; A.R.S. § 13-4062(2).]**

10. *State v. Trujillo,* 248 Ariz. 473 (2020)—In this criminal sexual abuse case, the Arizona Supreme Court majority held that a jury need not find the facts necessary to impose sex offender registration—like a victim's age—as Arizona's sex offender registration laws comprise a civil regulatory scheme that is not so punitive so as to implicate *Apprendi v. New Jersey*, 120 S. Ct. 2348 (2000). A trial court judge may properly make that finding of fact, pursuant to A.R.S. § 13-3821(A)(3). **[U.S. Const. Amend. VI.]**

11. *State v. Riley*, 248 Ariz. 154 (Ariz. March 10, 2020)—The Arizona Supreme Court held, among other things in this capital case, that evidence that the victim had been in protective custody and had been targeted by a prison gang was relevant to motive, the proper foundation was laid for its admission, and there was no Rule 403 violation as the evidence was not unfairly prejudicial. Because the defendant never admitted he killed the victim at all, however, let alone in self-defense, evidence of the victim's peaceable character as a model inmate was irrelevant, but its admission was harmless error in light of the all the admissible evidence pointing to defendant's guilt. Defendant also knowingly, intelligently, and voluntarily waived his right to present mitigation evidence during the penalty phase; multiple colloquies with the trial court supported this finding, as did the results of the competency evaluation requested by defense counsel. **[Rules 401, 403.]**

12. *State v. Johnson*, 247 Ariz. 166 (2019)—In this capital case, the Supreme Court affirmed the defendant's convictions and sentences, in a nearly forty-page opinion addressing a number of evidentiary and other issues. In evaluating rulings limiting mitigation evidence, the Arizona Supreme Court noted that the Rules of Evidence do not apply in the *penalty phase* of a first-degree murder trial, but courts are guided by fundamentally the same considerations. The trial court either did not err or committed only harmless error in limiting mitigation evidence including that on the Columbine High School shooting (defendant was a student there at the time), adopted-child syndrome, and drug-seeking behavior. The court also held, *inter alia*, that the trial court did not improperly limit defendant's cross-examination of the State's DNA technician under Rule 106, and that the trial court properly

treated Rule 106 as a rule of inclusion, not exclusion. ¶¶ 127–132. **[Rule 106.]**

13. *State v. Malone*, 247 Ariz. 29 (2019)—In this first-degree murder case, the trial court did not abuse its discretion in precluding defendant's expert from providing testimony about impulsivity "based on findings of brain damage or brain injury," stating that such testimony would "be encompassed by mental incapacity/diminished capacity/mental defect." *See State v. Mott*, 187 Ariz. 536, 540-41 (1997). The Arizona Supreme Court, with then-Chief Justice Bales dissenting in part but concurring in the judgment, held that a defendant who permissibly introduced expert evidence of a character trait for impulsivity to challenge premeditation may not also introduce evidence of brain damage to corroborate that trait. Although the Court has authority to promulgate rules of evidence, it can—and has chosen to—defer to Arizona's long-standing legislative policy to not permit the admission of mental disease or defect evidence to refute *mens rea* (also known as a diminished capacity defense). (On the other hand, the trial court properly allowed defendant to present other testimony, including expert testimony, to show that he had a character trait for impulsivity to rebut the State's claim that the murder was premeditated. *See State v. Christensen*, 129 Ariz. 32, 35 (1981); *see also* Ariz. R. Evid. 404(a)(1) (authorizing admission of character trait evidence offered by an accused); Ariz. R. Evid. 405(a) (stating that character trait evidence can be offered as an opinion). Such evidence is properly described as "behavioral-tendency evidence.") Chief Justice Bales concurred in the judgment, as any error was harmless, but did not see fit to join "the majority's blanket bar on brain damage evidence to support a claimed character trait for impulsivity." He noted that Arizona Rule of Evidence 105 expressly contemplates the admission of evidence that can be considered for some purposes but not for others and that a limiting instruction may cure concerns about jurors considering the evidence for purposes other than proof of a trait for impulsivity. The Supreme Court vacated the court of appeals' opinion and affirmed the defendant's convictions and sentences. **[Rules 105, 404(a)(1) and 405(a).]**

14. *Phillips v. Hon. O'Neil/State Bar*, 243 Ariz. 299 (2017)—Rule 408 precludes use of a consent judgment in a State-initiated consumer fraud act proceeding to prove substantive facts to establish liability for a subsequent claim in an attorney discipline proceeding, and a consent judgment likewise cannot be used for impeachment purposes under Rule 613. The operative provision is Rule 408(a)(1), which prohibits the admissibility of evidence of "furnishing, promising, or offering—or accepting, promising to accept, or offering to accept—a valuable consideration in compromising or attempting to compromise the claim." J. Bolick, dissenting, suggests a better approach would be to address the issue in rulemaking, citing *In re Establishment of the*

Advisory Comm. on Rules of Evidence, Admin. Order No. 2012-43 (2012). **[Rule 408.]**

Arizona Court of Appeals

1. *State v. Huante*, 54 Ariz. Cases Digest 8 (App. 2021)—When considering whether a prior conviction qualifies as "historical," the Court looks to the date of the Defendant's conduct, not the date of results that exposed the defendant to prosecution. Defendant was convicted of negligent homicide. The defendant struck the victim with a cement block and the victim died four days later. The prosecution alleged two prior convictions. One of the convictions—possession of drug paraphernalia—could only be alleged as a "historical prior" (and thus be used to enhance the sentence) for five years. But this deadline could be extended for any time the defendant spent incarcerated. The conviction occurred five years, and 216 days, before the date the defendant struck the victim with the cement block. The trial court found the defendant had previously spent 216 days in custody. The drug paraphernalia conviction thus precisely met the 5 year cut-off and qualified as a historical prior. On appeal, the defendant argued the operative date was the date the victim died four days later. In a fundamental error review, the Court of Appeals concluded the operative date was when the defendant engaged in the conduct. The date of an offense is assessed by the defendant's conduct, not the date of the consequences. Regardless of when the victim died, the defendant's conduct occurred when the defendant struck the victim with a cement block. **[Evidence of historical prior felony convictions for purposes of applying sentencing enhancements.]**

2. *State v. Mora,* 54 Ariz. Cases Digest 4 (App. 2021)—The Court of Appeals held that offenses committed in other jurisdictions can serve as predicate felonies for sentencing enhancement for dangerous crimes against children under A.R.S. § 13-705(I), provided they fall under one of the enumerated categories of predicate felony in A.R.S. § 13-705(Q)(2). The court also rejected Mora's claim that the question of whether his Texas convictions were "sexual offenses" qualifying as predicate felonies was a question of fact for the jury, concluding that the issue was one of law for the trial judge. However, the trial court fundamentally erred in finding, based upon documents confirming the Texas convictions and the testimony of the Texas victims under Ariz. R. Evid. 404(c), that Mora's convictions were predicate "sexual offenses" under § 13-705(Q)(2). For a foreign conviction to qualify as a predicate felony, it must be analogous to an Arizona felony, such that the foreign statute includes every element that would be required to prove an Arizona felony. The State conceded, and the Court of Appeals agreed, that there is no Arizona statute

strictly analogous to the Texas statute at issue, mandating resentencing. **[Ariz. R. Evid. 404(c).]**

3. *Benedict v. Total Transit Inc., et al.*, 52 Ariz. Cases Digest 37 (App. 2021)—The case included claims brought on behalf of multiple—one deceased and one severely injured—victims of a vehicle/pedestrian accident involving a taxicab driver. The superior court did not abuse its discretion in permitting testimony of a plaintiff's expert regarding medical causation and reasonableness of medical bills—even though he had not specifically been disclosed as a causation and/or medical billing expert—because opposing parties had an opportunity to defend against the testimony, and its admission did not exceed the bounds of reason of the expert's anticipated testimony based on disclosures. On appeal, the issue is not whether appellate judges would have made the same ruling on the disclosure issue, but whether in light of the law and circumstances, one could have reasonably made the same ruling. The court further rejected challenges to given and omitted jury instructions finding that the instructions as a whole included the correct law to permit the jury to reach the verdicts rendered, and defendants could not establish prejudice. At trial, the superior court consolidated two separate suits arising from the same incident and a different group of six jurors returned verdicts finding defendant negligent, but apportioned different percentages of fault to the two victims. The court determined that this result was neither inconsistent or irreconcilable because a minimum of 6 jurors returned each verdict pursuant to A.R.S. §21-102(C) and based on the evidence presented at trial, it was reasonable to apportion different degrees of fault to the two victims. **[Ariz. R. Civ. P. Rule 37(c); expert evidence, jury instructions].**

4. *Coleman v. Amon*, 51 Ariz. Cases Digest 17 (App. 2021)—In a birth-injury medical malpractice case, the trial court precluded evidence offered by plaintiffs that the defendant physician had allegedly made certain statements that could be construed as admitting fault and apologized to them for the unfortunate outcome suffered by plaintiffs' child. The trial court excluded the doctor's statements pursuant to A.R.S. § 12-2605, which precludes admission of "any statement, affirmation, gesture or conduct expressing apology, responsibility, liability, sympathy, commiseration, condolence, compassion or a general sense of benevolence that was made by a health care provider" for purposes of proving liability. Plaintiffs argued on appeal that § 12-2605 violates separation of powers, is a special law in violation of art. IV, pt. 2, § 19 of the Arizona Constitution, and violates Arizona's Privileges and Immunities Clause (art. II, § 13). The Arizona Court of Appeals affirmed, holding that the law is a valid exercise of legislative authority, is not a special law, and does not violate the Privileges and Immunities Clause since it satisfies rational basis review. The court went on

to state that the doctor's statements could be used for impeachment if the doctor "opened the door" to such evidence. **[Apology evidence preclusion law.]**

5. *Aspen Biotech Corp. v. Wakefield*, 2021 WL 3503399, 1 CA-CV 20-0384 (Ariz. App. August 10, 2021) (mem.)—The trial court did not abuse its discretion in excluding a damages expert witness who would have testified a one-third equity owner suffered $15 million in economic damages based on valuing the company at over $45 million, but who conceded he had "not applied any method of accepted business valuation" in valuing the company as a whole. Rule 702 and *Daubert* require an expert's testimony be based on reliable principles and methods, and the court properly exercised its gatekeeping function. The trial court allowed an owner to testify as to the company's value under the well-settled principle an owner or prospective owner of property can testify to its value. But, as a lay witness rather than a disclosed and qualified expert, the owner could not buoy his testimony by introducing financial records outside his personal knowledge. Analyzing financial records requires expert testimony, and under these facts allowing the owner to do so himself would exceed the boundaries of permissible owner-opinion testimony under Rule 701. The trial court properly precluded using a pre-litigation proposed term sheet to establish damages. The term sheet was part of an offer to settle a dispute, and under Rule 408 and *Phillips v. O'Neil*, 243 Ariz. 299, 301 ¶ 8 (2017) the dollar amounts were inadmissible even though the offer occurred before filing the lawsuit. **[Ariz. R. Evid. 408, 602, 701, 702.]**

6. *State v. Fristoe*, 251 Ariz. 255 (App. 2021)—When a federal statute requires a private party to report illegal activities in its servers to a government agent, the private party is not deemed to be a state actor even if the private party was motivated to assist law enforcement to some extent. This is because this mutuality of purpose does not convert the private party into a state actor. The private party is not required to *search* illegal activities in its servers nor did law enforcement know or acquiesce the private party's searches. In addition, even though Arizona's Private Affairs Clause does not include the word "reasonable," it stays within the Fourth Amendment reach except for warrantless home entry cases. This is because the clause does not mean that Arizona courts ignore the reasonableness of citizens' expectations of privacy. The private search doctrine consequently applies under Arizona's Private Affairs Clause.

7. *State v. Hood*, 40 Ariz. Cases Digest 28 (App. as amended March 22, 2021)—The superior court was not required to *sua sponte* bifurcate a case agent witness's testimony into fact-witness and expert portions. While courts have expressed concerns (unmerited credibility, juror confusion, inhibited cross-examination, etc.) when a witness testifies as both a fact witness and expert,

no fundamental error occurred here. The record reflected that the case agent's expert testimony was significantly distinct from her factual testimony. The prosecutor also marked the conclusion of expert testimony by the case agent by noting that the general testimony about trafficking was ending and that she would begin to answer questions about "this particular case." **[Ariz. R. Evid. 602, 703.]**

8. *Wisniewski v. Dolecka*, 2021 WL 1747418, --- Ariz. --- (May 4, 2021)—As a matter of first impression in Arizona, the burden of proof for a claim of fraud justifying an annulment under A.R.S. § 25-301 is clear and convincing evidence, not a preponderance of the evidence.

9. *State v. Loos*, 2021 WL 1110909 (App. March 23, 2021) (mem.)—Fundamental error did occur where a prosecutor made multiple assertions to the jury that the defendant had committed perjury while testifying in his own defense. Pre-trial, the State had filed an Ariz. R. Evid. 609(a)(2) notice of its intent to use the defendant's misdemeanor conviction for false reporting to law enforcement for impeachment purposes, but never sought admission of other misdemeanor convictions of the defendant—presumably because the elements of those crimes did not require proof of a dishonest act or false statement to satisfy Rule 609(a)(2). Instead, the prosecutor accused the defendant at least four times of perjuring himself when his answers at trial referenced only "a misdemeanor" conviction. With this case being one without physical evidence and so turning on credibility of the defendant and victim, the appellate court found that the prosecution's unfounded and unchallenged accusations created a reasonable likelihood of unfairly prejudicing jurors against the defendant. **[Ariz. R. Evid. 609.]**

10. *Cavallo v. Phoenix Health Plans, Inc.*, — Ariz. —, 2021 WL 710183 (App. Feb. 23, 2021)——The superior court did not abuse its discretion in excluding multiple versions of telephone call logs and an Account Resource Guide ("ARG"). The proponents did not lay an adequate foundation for the call logs, as proffered witnesses did not have personal knowledge of whether the listed calls concerned the claims at issue. And the ARG was both irrelevant (as it had to do with another, later-in-time version of a health plan other than the one at issue) and cumulative of undisputed testimonial evidence. **[Rules 104, 403, 602.]**

11. *State v. King*, — Ariz. —, 2021 WL 404281 (App. February 4, 2021)——While an appellate court defers to the post-conviction relief ("PCR") court's credibility evaluations of witnesses who testified in proceedings before it, a medical diagnosis is not new evidence under Ariz. R. Crim. P. 32.1(e) merely because it was not introduced at a defendant's trial. The testimony of a new expert whose conclusions differed from those appointed for trial did not

warrant the post-conviction relief of a new trial. Judge Brown dissented, noting that the State did not offer any evidentiary challenges to the PCR court's decisions at a four-day evidentiary hearing. Judge Brown, dissenting, would have found that the PCR court properly exercised its discretion in weighing the testimony and in making evidentiary findings supported by sufficient facts.

12. *State v. Ross*, 2021 WL 915760 (App. 3/09/2021) (mem.)——Evidence of injuries presented at a bench trial, without testimony of any medical expert, was sufficient for a reasonable person to find substantial evidence present to convict of aggravated assault. Under Ariz. R. Evid. 702(a), expert testimony is permitted to help the trier of fact understand the evidence, but where—as here—the evidence can be understood by a reasonable factfinder, medical testimony is not necessary, even if helpful. *See also State v. Roberts*, 139 Ariz. 117, 122 (App. 1983). **[Rule 702.]**

13. *State v. Olaoye*, 2020 WL 7828769 (App. as amended 1/22/2021) (mem.)—— Prosecutorial misconduct, including improper questions to a lay witness eliciting opinion testimony on the ultimate issue and references to evidence (a baggie of rosemary) outside the record during closing argument, had a cumulative effect that deprived the defendant of a fair trial, requiring remand for retrial. **[Rules 403, 701.]**

14. *State v. Cabrera*, 250 Ariz. 356 (App. 2021)——Excited utterance hearsay exception "is premised on the assumption that the excitement of certain startling events stills the reflective faculties. A spontaneous utterance occurring at the time of or under the stress of the 'startling event' is therefore thought to be reliable." While a defendant's statements he purported to be excited utterances were not inadmissible merely because they were self-serving, the trial court did not abuse its discretion in finding that no startling event occurred sufficient to allow defendant's statements denying knowledge of criminal activity and asserting that he merely took a car for detailing to be admissible as excited utterances. **[Rule 803(2).]**

15. *State ex rel. Adel v. Hon. Hannah*, 35 Arizona Cases Digest 4, 2020 WL 7778998 (App. Dec. 31, 2020)——"The type and extent of testing an expert performs while forming an opinion generally is an issue for the expert, not a judge. If otherwise qualified experts, providing otherwise admissible evidence, disagree on the extent or nature of required testing, they should explain their reasoning to the jury, not the court." Trial court orders granting motion to limit scope of State's expert's psychological evaluation of defendant would be vacated. **[Gatekeeping function, expert evidence.]**

16. *Solorzano v. Jensen*, 34 Arizona Cases Digest 27, 2020 WL 7703115 (App. Dec. 29, 2020)——While a party who has agreed to proceed by avowal cannot later challenge the sufficiency of evidence on appeal, a trial court may not assess the credibility of witnesses based on briefs, affidavits, and documentary evidence alone. Due process required an evidentiary hearing, where testimony could be seen and heard, before credibility assessments could be factored into a child support determination. The appellate court noted that a virtual hearing where testimony was seen and heard live would suffice as much as a physical in-person one.

17. *State v. Kleinman*, 34 Arizona Cases Digest 13, 2020 WL 7585618 (App. Dec. 22, 2020)——It was undisputed that a jury should not have heard Rule 404(b) evidence for an improper purpose, but there was no reasonable probability the verdict would have been different, particularly because the references were brief, without context or detail, and quickly stricken, and the jury was instructed to disregard them. The trial court did not abuse its discretion in denying a motion for mistrial. **[Rule 404(b).]**

18. *McDaniel v. Payson Healthcare Management, Inc.*, 250 Ariz. 199 (App. 2020)——Treating physicians' testimony violated the one-expert-per-side rule in the manner in which it was elicited, requiring remand for new trial. Undisclosed expert opinions were also admitted into evidence at trial, causing prejudice. **[Ariz. R. Civ. P. 26(b)(4)(F); 26.1; 37(c)(1).]**

19. *State v. Brown*, 250 Ariz. 121 (App. 2020)—A trial court's admission of evidence during a probation revocation hearing is reviewed for an abuse of discretion, and the trial court did not abuse its discretion in admitting the probationer's urinalysis test results over his objections as to their reliability. The Court of Appeals held that the Arizona Code of Judicial Administration § 6-110, on which probationer based his objections, does not determine the admissibility of probationer urinalysis test results, which are admissible if they are deemed reliable. **[Ariz. R. Crim. P. 27.8(b)(3).]**

20. *Perdue v. La Rue*, 250 Ariz. 34 (App. 2020)—The Court of Appeals held that the sham affidavit doctrine applies to testimony in litigation. The trial court properly disregarded a declaration that squarely contradicted earlier divorce deposition testimony by the same person in a separate proceeding. A party cannot defeat summary judgment by submitting an affidavit that contradicts the party's prior sworn testimony—an attempt to do so is considered a sham and may be properly disregarded. **[*See* Ariz. R. Civ. P. 56.]**

21. *In re: MH2019-004895*, 249 Ariz. 283 (App. 2020)—The trial court's order for involuntary treatment was vacated where an outpatient clinical liaison was

permitted to testify about confidential information in violation of the behavioral health professional-client privilege. **[Rule 501; A.R.S. § 32-3283.]**

22. *State v. Zaid*, 249 Ariz. 154 (App. 2020)—In a case turning on evidentiary offerings about a victim, the trial court rulings were reversed and remanded in part. Even though there was not a formal offer of proof under Rule 103(a), Ariz. R. Evid., the Court of Appeals found that the substance of the proffered evidence was apparent from the context, including the State's own acknowledgement that witnesses had said the victim had a violent reputation. The trial court properly excluded evidence of the victim's prior violent acts as offered to corroborate defendant's self-defense claim, where the probative value was substantially outweighed by a danger of unfair prejudice. The defendant did not establish a specific reason that the violent-acts-of-victim evidence would have been particularly probative, and the evidence carried the risk that jurors would surmise that the victim was a bad man who had gotten what he deserved. The trial court committed a not-harmless error, however, in precluding reputation and opinion evidence of the victim's violent character, as Rule 404(a)(2) expressly permits its use for that purpose and there was doubt present as to who was the first aggressor in the fatal confrontation. **[Rules 103, 404, 405.]**

23. *State v. Hamilton*, 249 Ariz. 303 (App. 2020)—Defendant appealed from his convictions and sentences for various sexual conduct offenses, arguing the trial court erred when it ruled that three witnesses who testified about other acts evidence, pursuant to Rule 404(c), were considered victims under Arizona law and therefore entitled to (1) refuse pretrial interviews and (2) remain present in the courtroom during trial even though Defendant had invoked the rule of exclusion of witnesses. The Court of Appeals held the trial court properly declined to allow pretrial interviews of the three witnesses. The witnesses were entitled to assert their rights as victims because their anticipated testimony stemmed from an earlier prosecution against Defendant. Although Defendant was no longer on probation from this prior prosecution, the Court found that the witnesses retained their victims' rights because Defendant's charges had not reached a final disposition; he had an ongoing duty to register as a sex offender. The Court of Appeals found the trial court erred in allowing the witnesses to hear the testimony of other witnesses at trial. The Court held that victims of a prior offense cannot exercise every right available to victims under the Victim Bill of Rights. Although the witnesses testifying under Rule 404(c) had the right to refuse pretrial interviews, that right did not extend so far as to allow them to remain in the courtroom during Defendant's trial when other witnesses were testifying, after the invocation of Rule 615. However, the Court found the error did not result in prejudice, as there was no evidence that the witnesses

altered their stories or were influenced in their testimony. Defendant's convictions were affirmed. **[Rule 404(c); Rule 615]**.

24. *Brown, et al. v. Dembow*, 248 Ariz. 374 (App. 2020)—The trial court did not err in excluding a civil defendant's prior conviction from being used for impeachment purposes under Arizona Rule of Evidence 609(a)(1)(A), as the defendant was not a felon when she testified at trial. Instead, after the incident giving rise to the civil case, but before she testified at the civil trial, a court had designated the civil defendant's Class 6 undesignated felony conviction as a misdemeanor, at the request of her probation officer. The appellate court also denied a motion to strike, taking judicial notice pursuant to Arizona Rule of Evidence 201, of certain documents in the superior court's file that the appellants submitted that were related to the civil defendant's prior criminal case. The appellate panel also noted that the Arizona common law rules were aligned with its decision here—felons were deemed incompetent to testify at common law, while misdemeanor convictions could not even be used for impeachment. **[Rule 609(a)(1)(A).]**

25. *State v. Arias*, 248 Ariz. 546, 562–63 (App. 2020)—In the appeal of a verdict resulting from a trial that garnered an incredible amount of media attention and also resulted in findings of prosecutorial misconduct, the Arizona Court of Appeals found, in part, that the prosecutor's conduct did not mean certain evidence was used for impermissible propensity purposes. The trial court instructed the jury to consider any other-acts evidence—like the fact that the defendant took a piece of the victim's jewelry—only to "establish the defendant's motive, intent, preparation or plan," and not to "determine the defendant's character or character trait or to determine that the defendant acted in conformity with the defendant's character or character traits and therefore committed the charged offense." **[Rule 404.]**

26. *State v. Gasbarri*, 248 Ariz. 619 (App. 2020)—The trial court erred in granting a motion to suppress evidence seized from a cell phone—even though the prosecution had failed to respond to the motion—because the defendant had not met his burden to allege specific circumstances to establish a prima facie case supporting suppression of the evidence at issue. Ariz. R. Crim. P. 16.2(b)(2). The defendant had merely alleged the lack of a warrant, but the Court of Appeals did refer the prosecution to the State Bar for its failure to respond in timely or any writing to the motion to suppress, even after obtaining an extension of time in which to do so. **[U.S. Const. Amend. IV; Ariz. R. Crim. P. 16.2(b)(2).]**

27. *State v. Togar*, 248 Ariz. 567 (App. 2020)—Evidence of prior thefts from a 97-year-old senior-living facility resident's wallet was not impermissible other-acts evidence, was relevant, and was admissible—given that probative value

was not substantially outweighed by the danger of unfair prejudice. The evidence was presented in such a way at trial that it was not stated or even implied that those thefts were attributable to defendant's conduct. The defendant was further not entitled to a *Willits* (96 Ariz. 184 (1964)) instruction regarding missing surveillance video pieces, as witnesses who had seen and heard the full video credibly testified that the missing parts did not tend to exonerate defendant, and speculation, without more, cannot support a *Willits* instruction that the jury should have presumed the missing evidence would tend to exonerate the defendant. **[Rules 401, 402, 403, 404.]**

28. *State v. Jaramillo*, 248 Ariz. 329 (App. 2020)—While joint trials are favored in the interests of judicial economy, *State v. Murray*, 184 Ariz. 9, 25 (1995), a trial court abused its discretion where the defendants' defenses were each so wholly inconsistent that they were antagonistic and mutually exclusive sufficient to require severance of the trials. Joinder is appropriate if "each defendant is charged with each alleged offense, or if the alleged offenses are part of an alleged common conspiracy, scheme, or plan, or are otherwise so closely connected that it would be difficult to separate proof of one from proof of the others." Ariz. R. Crim. P. 13.3(b). The Arizona Supreme Court has identified four circumstances that might require severance based upon potential prejudice to one or more defendants:

    (1) Evidence admitted against one defendant is facially incriminating to the other defendant,
    (2) Evidence admitted against one defendant has a harmful rub-off effect on the other defendant,
    (3) There is significant disparity in the amount of evidence introduced against the defendants, or
    (4) Co-defendants present antagonistic, mutually exclusive defenses or a defense that is harmful to the co-defendant.

    Murray, 184 Ariz. at 25. Here, the core of Defendant's defense was that he was a struggling shopkeeper who rented the back room of a store to his co-defendant, Islas, without knowing that Islas was warehousing and dealing drugs. The core of Islas's defense, though, was that he was nothing more than a delivery driver for Defendant with no knowledge that he was delivering Defendant's drugs. These defenses were wholly inconsistent, and the Court of Appeals found the case to fall under the fourth *Murray* scenario above. The appellate panel rejected the State's argument that a limiting instruction cured the error by directing jurors to consider the evidence separately as to each co-defendant. This instruction may reduce prejudicial effect in the evidence-based categories of severance cases, but it did not prevent prejudice when the primary harm results from failure to sever antagonistic defenses, and the State did not prove the error harmless on appeal. The case was

reversed and remanded for a new trial. **[(Rule 105); Ariz. R. Crim. P. 13.3(b).]**

29. *State v. Giannotta*, 248 Ariz. 82 (App. 2019)—Jointly constructed records—for example, a full serial number for a rifle—can qualify under the recorded-recollection exception to the hearsay rule if each person in the chain testifies to performing his or her role accurately. A law enforcement officer's report that recorded a serial number of a rifle that was read over the phone by a victim of theft was admissible once each testified to appropriate foundation of having reported and recorded, respectively, the number accurately. **[Rule 803(5).]**

30. *State v. Gentry*, 247 Ariz. 381 (App. 2019)—The trial court did not abuse its discretion in concluding other act evidence was relevant and offered for a proper purpose under Rule 404(b) and in suppressing a particularly inflammatory detail from the other act evidence because exclusion did not impact its "probative essence." *See State v. Hughes*, 189 Ariz. 62 (1997) (citing *State v. Salazar*, 181 Ariz. 87 (App. 1984)). Defendant argued the trial court erred when it precluded certain other act evidence. Defendant shot the victim while both were in Defendant's home. The victim was the boyfriend of Defendant's stepdaughter and they shared a child. At trial, the Defendant moved *in limine* to admit evidence of the victim's other acts of violence before the shooting about which Defendant had knowledge. One of the acts involved the victim pushing his girlfriend (Defendant's stepdaughter) to the ground while she was pregnant, causing her to go into early labor. After an evidentiary hearing, the trial court allowed Defendant to present the other act evidence but precluded any mention of pregnancy or early labor. The trial court found the pregnancy and early labor detail had very little probative value as to whether Defendant felt the need to use deadly physical force and raised a greater possibility the jury would be misled by focusing on the unborn baby as opposed to the Defendant's state of mind. **[Rule 403; 404(b).]**

31. *State v. Ibeabuchi*, 248 Ariz. 412 (App. 2020)—Division One affirmed the superior court's appointment of counsel for a competent Defendant who lacked the mental capacity to conduct a trial himself. Reasonable evidence supported the superior court's ruling regarding this "gray-area defendant." Such persons are competent to stand trial in that they can assist their attorney with a reasonable degree of rational understanding, but they lack the mental capacity to minimally participate in the process as an advocate. When a person qualifies as a gray-area defendant, the superior court may, within its discretion, deny them the right of self-representation. Defendant failed to respond appropriately to the Court's questions, made statements at odds with the record, spent one year filing repeated objections to the withdrawal of a prior attorney, did not understand the applicable law, and

failed to comply with Court orders, including those that he be transported to his own hearings. By denying Defendant's motion, the Court ensured that he received a fair probation violation proceeding and helped to maintain the proceeding's integrity. **[U.S. Const. Amend. VI, XIV; Ariz. Const. art. 2, sec. 24.]**

32. *State v. Fuentes*, 247 Ariz. 516 (App. 2019)—A defendant had a legitimate expectation of privacy in a mobile home owned by his son over which the defendant exercised significant control, such that the fruits of a warrantless search couched as a 'protective sweep' should have been suppressed. As the error was not harmless as to defendant's first-degree murder sentence, the case was remanded for resentencing. It was not an abuse of discretion, however, to exclude testimony of a crime scene technician who was not qualified to testify that he had seen a shoeprint that might have been consistent with victim's shoes. The technician had no expertise in shoe-tread identification evidence, and the opinion that shoe treads were similar came from a detective at crime scene and not from the technician's own perceptions. **[U.S. Const. Amend. IV.]**

33. *State v. Rose*, 246 Ariz. 480 (App. 2019)—Affirming defendant's convictions after a jury trial on two counts of sexual conduct with a minor under the age of 15. The court held that, under Rule 404(c), the trial court did not err in admitting defendant's juvenile delinquency adjudication as other-act evidence to prove the defendant's character trait giving rise to an aberrant sexual propensity to commit a criminal sexual offense. Rule 404(c) provides factors a trial court must consider, after which it may admit evidence of another crime, wrong or act committed by a minor, including one that resulted in a juvenile delinquency adjudication. **[Rule 404(c).]**

34. *Sandra R. v. DCS*, 246 Ariz. 180 (App. 2019), *vacated in part on other grounds by Sandra R. v. DCS*, 248 Ariz. 224 (2020)—The court affirmed the juvenile court's severance order and held, among other things: (1) the juvenile court committed harmless error by allowing DCS to introduce statements from scientific articles without meeting the foundational requirements of Rule 803(18); and (2) sufficient evidence supported the abuse finding related to the shaken-baby injury even though the evidence did not prove which parent abused the child. **[Rule 803(18).]**